IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 488 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAIBEN W/O JASABHAI HIRABHAI AND OTHERS
Versus
STATE OF GUJARAT

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Appearance :
MR YOGESH S LAKHANI assisted by MR HARNISH V DARJI for the Appellants
MR AJ DESAI, ADDITIONAL PUBLIC PROSECUTOR for the Opponent

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 01/11/2006

ORAL JUDGMENT

1. The appellants, five in number have filed this appeal under Section 374 of the Code of Criminal Procedure (“Cr.PC”, for short) against the judgment and order passed by the learned Sessions Judge, Rajkot dated

29.03.1993 in Sessions Case No.112 of 1991.

It is reported that appellant No.5 – Shri Jasabhai Hirabhai Ahir has expired during the pendency of the appeal.

2. The learned Sessions Judge was pleased to convict the accused for the offence under Sections 147, 148 and 323, 324, 325 read with Section 149 of the Indian Penal Code (“IPC”, for short) and for the offence under Sections 37(1) and 135 of the Bombay Police Act. The learned Sessions Judge was also pleased to convict the accused for the offence under clause (x) of Sub-section (1) of Section 3 of The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989 (“Atrocities Act”, for short).

After hearing the accused on the point of punishment, the learned Sessions Judge was pleased to hold that the request of the learned advocate for the accused for grant of probation cannot be accepted. The learned Sessions Judge was pleased to award 6 months S.I., fine of Rs.100/- and in default, 7 days S.I. for the offence under Section 325 read with Section 149 of the IPC.

The learned Sessions Judge was pleased to award 2 months S.I., fine of Rs.50/- and in default, 7 days S.I.

for the offence under Section 324 read with Section 149 of the IPC.

He was pleased to award 7 days S.I., fine of Rs.25/- and in default, 7 days S.I. for the offence under Section 323 read with Section 149 of the IPC.

The learned Sessions Judge was pleased to awrd 6 months S.I., fine of Rs.100/- and in default, 7 days S.I. for the offence under clause)(10) of Sub-section (1) of Section 3 the Atrocities Act.

The learned Sessions Judge was pleased to award no separate sentence for the offence under Sections 147 and 148 of the IPC and Sections 37(1) and 135 of the Bombay Police Act.

The learned Sessions Judge was pleased to order that the main sentences shall run concurrently and the period for which the accused have remained in jail as an under trial prisoners, shall be given set-of.

3. The facts of the case are that on the day of the incident, i.e. 13.04.1991, the complainant – Punabhai Madhabhai Vankar, residing in Mafatiyapara, near Ganesh Vulcanizing at Gondal Road in the city of Rajkot at around 10.00 A.M. was attacked by the accused Govind Makwana Ahir, Jasabhai Hirabhai Ahir, Raiben, wife of

Jasabhai, Ganuben, wife of Govindbhai and Prabhaben, daughter of Govindbhai. Govindbhai was armed with a 'kosh' (an iron rod used for digging the land), Jasabhai with an axe, Raiben with stones, Ganuben with an iron pipe and Prabhaben with a stick. The complainant tried to run away towards his house, but when he reached near 'Tiles' Factory, he was beaten by the accused. Govindbhai, armed with 'kosh' gave a blow on the right leg of the complainant. Jasabhai Ahir gave an axe blow on the right hand shoulder of the complainant. Ganuben gave an iron pipe blow on the right leg calf and also on the thy, Prabhaben gave stick blow on the left hand, calf of left leg, thy and the ankle of the complainant, whereas Raiben gave free stone blow to the complainant. The injuries caused by accused with sharp cutting weapons also resulted into fracture on the right leg and right hand.

It is the case of the prosecution that Liliben, wife of the complainant and Shilpaben, daughter of the complainant were present at the scene of offence. Liliben, wife of the complainant intervened to rescue the complainant. At that time, accused caused injuries to her also.

The case of the prosecution is that the reason/motive to assault the complainant is that wife of

the complainant had filed a complaint against Ganuben and Raiben with regard to a quarrel amongst them in the matter of fetching water from a tap. It is on account of the said complaint that all the 5 accused jointly assaulted the complainant and caused injuries. It is also the case of the prosecution that at the relevant time, somebody telephoned to the police and therefore, police vehicle reached the scene of offence and took the injured complainant to the Government Hospital. The complainant filed a complaint against all the 5 accused. The Head Constable, Shri Bahauddin C.Patel of 'C' Division Police Station forwarded the said complaint along with his written report to Police Sub Inspector Shri Siddiqui for further investigation.

4. PSI Shri Siddiqui went to the hospital and registered a complaint of the injured complainant and sent the same for registering an offence, prepared a Panchnama of the scene of offence, recovered a bloodstained stone from the scene of offence after drawing a Panchnama and recorded statements of the witnesses. He recorded a statement of witness, Shilpaben – daughter of the complainant and carried further the investigation. The PSI having found the sufficient material against the accused, filed a charge sheet.

5. The prosecution examined the injured complainant –

Punabhai Madhabhai, PW1, Exh.12, Dr.Anilkumar Gordhandas Patel, PW2, Exh.13, Dr.Chelshankar Bhanushankar Shastri, PW3, Exh.15, Mohanbhai Govindbhai, PW4, Exh.18, Veljibhai Jivrajbhai, PW5, Exh.19 (Panch witness), Damjibhai Valjibhai, PW6, Exh.21 (Panch of scene of offence), Sukhdevsinh Bharatsinh Jadeja, PW7, Exh.23 (Panch), Merambhai Somlabhai, PW8, Exh.24 (an employee from Police Commissioner's Office), Gulabrao Hiralal Pawar, PW9, Exh.26 (PSI from C Division Police Station, who recorded the complaint filed by accused No.4, stating assault by an iron rod which is registered as NC complaint), Valjibhai Somabhai, PW10, Exh.28 (serving as PSO at C Division Police Station on the date of the incident, i.e. 13.04.1991 at 14.10 PM), Gordhanbhai Rudabhai, PW11, Exh.34 (Panch), Bhavdip Tapeshwar, PW13, Exh.37 (serving as PSO at C Division Police Station on the date of the incident, i.e. 13.04.1991 at 11.30 AM), Dr.Amrutlal Devjibhai, PW14, Exh.40 (Medical Officer, Government Hospital, Rakot), Lilaben, PW15, Exh.42 (wife of Punabhai), Shilpaben, PW16, Exh.43 (daughter of Punabhai), Chiranjilal Bhagvandas, PW17, Exh.44, Navalsinh Shivubha Zala, PW18, Exh.45, Narshudin Tajmahamad Siddiqui, PW19, Exh.47 (Investigating Officer).

6. Besides the aforesaid witnesses, the prosecution also placed the following documentary evidence on record, Mark A,

complaint, Injury Certificate of Govindbhai Pethabhai – accused No.4, Exh.14, Injury Certificate of Punabhai Madhabhai, Exh.16, case papers of Punabhai Madhabhai, Exh.17 (X-ray Department, Government Hospital, Rajkot, Panchnama (recovery of stick from Prabhaben – accused No.2 and also arrest of Raiben – accused No.1 and Prabhaben – accused No.2), Panchnama of scene of offence, Exh.22, NC complaint filed by accused No.4, Exh.27, communication from PSI, C Division Police Station, Rajkot to PSO, C Division Police Station, Rajkot, Exh.29, abstract of Station Diary Entry No.7/8/91 dated 13.04.1991, Exh.30, Panchnama (recovery of 'kosh', axe and iron pipe from accused Nos.4, 5 and 3 and their arrest), Exh36, Entry No.182/91 of Rajkot City C Division Police Station ('Janva jog Register'), Exh.38, communication with regard to entrusting of investigation by PSO, C Division Police Station to PSI, C Division Police Station, Exh.39, Injury Certificate of Lilaben Punabhai, Exh.41.

7. After the charge sheet was filed on the accused appearing in the Court, it was ascertain that the accused have received the investigation papers. Thereafter, the charge was framed at Exh.1, the same was explained to the accused and as the accused have denied the same, the trial proceeded. After recording of evidence was over,

statement of the accused under Section 313 of the Cr.PC was recorded. The accused have produced no evidence in their defence nor they have examined themselves. The only defence put forward by the accused is that a false case is registered against them; that they have committed no offence and that they are innocent.

8. The learned Sessions Judge after hearing the arguments of the parties framed as many as 5 issues and answered all the 5 in affirmative and the last issue about the order, was as per the final order passed in the matter.

9. Mr.Y.S.Lakhani, learned advocate for the appellants emphatically submitted that the learned Sessions Judge has erred in recording the conviction against the accused. He submitted that if the learned Sessions Judge has taken into consideration the contradiction in the evidence of the injured complainant and the so-called eyewitnesses, viz. wife and daughter of the complainant, the learned Sessions Judge would not have recorded the conviction. He submitted that there are more than one grounds on which the learned Sessions Judge would not have recorded the conviction and would have acquitted the accused for the offence charged against them.

10. Mr.Lakhani, learned advocate for the appellants

invited attention of the Court to the depositions of the injured complainant – PW1, who is examined at Exh.12, Lilaben – PW15 at Exh.42, Shilpaben – PW16 at Exh.43 and the Investigating Officer – PW19 at Exh.47 to bring home his contention that there were material contradictions in the depositions of these witnesses at every stage, i.e. right from the filing of the complaint, the complainant and the witnesses have tried to improve upon story and have deposed in a manner which is not worthy. He submitted that putting reliance on such depositions/evidence, the learned Sessions Judge has recorded conviction against the accused – appellants.

Learned advocate Mr.Lakhani submitted that the prosecution though named Valiben as one of the eyewitnesses, who was also named as a witness in the charge sheet, for no valid reasons, did not examine Valiben (mother-in-law of the injured complainant).

11. Learned advocate Mr.Lakhani invited attention of the Court to the charge framed against the accused wherein it is stated that the accused have committed offence under Sub-clause 1(1) of Section 3(1) of the Atrocities Act. He submitted that in fact, there is nothing like Sub-clause 1(1) of Section 3(1). He invited attention to Clause (x) of Sub-section (1) of Section 3 of the Atrocities Act which reads as under:

> “intentionally insults or intimidates with intent to humiliate a member of Scheduled Caste or a Scheduled Tribe in any place within public view;”

The learned advocate invited attention to the complaint (the complaint is not given separate exhibit, it is only given Mark A). He submitted that the complaint starts with narration of incident of 09.04.1991. Therein it is stated that, the wife of the complainant had some quarrel in the matter of fetching water with the wife of Govindbhai Ahir (accused No.4) and wife of Jasabhai Ahir (accused No.5). In the complaint it is further stated that, a complaint in that regard is already filed in the Police Station. The learned advocate submitted that at no stage that complaint is produced on the record of this case. It is while referring to the incident dated 09.04.1991, it is mentioned that wife of Govindbhai Ahir (accused No.4), wife of Jasabhai Ahir (accused No.5) and daughter of accused No.4 had restrained the wife of the complainant from fetching water and had told her that, you are 'Harijan' and therefore, you must not come to this tap for fetching water.

The learned advocate submitted that the complaint for the incident of 13.04.1991 starts then and in the entire complaint, there is not a word suggesting an offence being committed under the provisions of the

Atrocities Act.

At this juncture, learned Additional Public Prosecutor was asked to point out as to there is any averment in the complaint which alleges offence being committed under the Atrocities Act, the learned Additional Public Prosecutor could not point out anything from the complaint which will point a finger for an act amounting for an offence under the Atrocities Act.

Learned advocate for the appellants submitted that it is not necessary for a criminal act to have a definite motive, but then in the present case, the injured complainant has attributed the motive to the accused by saying that, for incident of 09.04.1991, a complaint was filed and keeping grudge for filing of complaint for the incident of 09.04.1991, accused had assaulted the complainant on 13.04.1991. He submitted that beyond that, nothing is mentioned in the complaint while describing incident of 13.04.1991 which will constitute an offence under the Atrocities Act.

The learned advocate for the appellants submitted that the complaint filed for the incident of 09.04.1991 is not brought on record and therefore, motive which is attributed for the incident of 13.04.1991 is not proved before the Court.

12. The learned advocate for the appellants submitted that in Exh.29 – report made by the PSI, C Division Police Station, Rajkot City to the PSO, C Division Police Station, Rajkot while referring to the short facts of the offence, it is mentioned that, offence under Sections 147, 148, 149, 325, 324 and 323 of the IPC, Section 3(1)(2) of the Atrocities Act and Sections 35(1) and 135 of the Bombay Police Act is committed. He submitted that reference to Section 3(1)(2) of the Atrocities Act is totally misplaced. At this juncture, the learned advocate invited attention of the Court to Clause (ii) of Sub-section (1) of Section 3 of the Atrocities Act, which reads as under:

> "acts with intent to cause injury, insult or annoyance to any member of a Scheduled Caste or a Scheduled Tribe by dumping excreta, waste matter, carcasses or any other obnoxious substance in his premises or neighbourhood;"

The learned advocate submitted that it is later on that Clause (x) of Sub-section (1) of Section 3 of the Atrocities Act was referred to. He submitted that, that was also not substantiated in light of the submissions made hereinabove.

13. The learned advocate for the appellants invited attention of the Court to the deposition of injured complainant who is examined as PW1 at Exh.12. He

submitted that for the first time before the Court (as it was not the case in view of the complaint referred to in detail hereinabove), the injured complainant has stated in paragraph No.3 that:

> “The incident taken place at 09.30 AM. The incident had happened in the matter of fetching of water. At that time, I was going with rickshaw and all the accused surrounded me and beaten me and they said that you are 'dhedh' and therefore, we will not allow you to fetch water. Thereafter, Jasabhai, armed with axe gave a blow on right hand. Person wearing khakhi cloths – accused Makwanabhai, armed with 'kosh' gave me blow on right leg, wife of Makwanabhai, armed with pipe gave me blow on my right leg, Prabhaben, armed with stick gave me blow on right leg calf, wife of Jasabhai was having stones in her hand and she gave me blow with stones.”

It is then stated that accused were abusing and they said:

> “If you come on this road, we will set you on fire, you leave the house and go away.”

The complainant has stated that at the time of incident, his wife and daughter were present. After that, police vehicle came and the complainant was taken to hospital in the police vehicle.

The learned advocate for the appellants invited

attention to the cross-examination of the complainant. The learned advocate submitted that in cross-examination, the complainant has admitted that earlier when a quarrel took place in the matter of fetching water, a complaint was filed (despite this admission of filing of complaint, no trouble is taken to get that complaint produced on the record of the case).

The learned advocate for the appellants submitted that the complainant was put a specific question in the cross-examination that, you have not stated in your complaint that, “when I was going with rickshaw, accused surrounded me and beaten me and told me that you are 'dhedh' and therefore, you should not come to fetch water.” At this juncture, learned advocate for the appellants invited attention of the Court to the deposition of the Investigating Officer – PW19, Exh.47. In paragraph No.3 in cross-examination, he has stated that the complainant has not stated in the complaint that, “incident had taken place at 09.30 AM; that the incident had taken place in the matter of fetching water; that when I was going with rickshaw, the accused had surrounded me and beaten me and had stated that you are 'dhedh' and therefore, we will not allow you to fetch water.” The Investigating Officer has also admitted in the cross-examination that in the complaint, the

complainant has not stated that, “the accused were abusing and had stated that if you will come on the road, we will set you on fire, you must abandon house and run away.”

14. The learned advocate for the appellants submitted that this shows that the injured complainant is a person who is improving upon his story and being conscious of the fact that an offence under the Atrocities Act is viewed seriously by the Court, has tried to falsely implicate the accused for the alleged offence under the Atrocities Act. The learned advocate invited attention of the Court of paragraph No.6 of the cross-examination of the injured complainant in which the complainant was asked as to whether he know Jaya Khengar, Lakha Sadul and Natubha Vaghela, to which the complainant replied in negative. He was also asked as to whether he knows Tejabhai, Vashrambhai and Bhimjibhai, to which the complainant replied in affirmative. So far as Sonaben and Ranjanben are concerned, he replied in negative and with regard to Chirajnilal and Nirmlaben, he replied in affirmative. The complainant was then asked as to whether he has filed any case against those persons, to which in the first instance, the complainant replied in affirmative and then in the next breath, he turned around and stated that he has not filed any cases. The learned

advocate for the appellants submitted that in fact, these are the persons against whom this very complainant has filed cases, alleging offence under the Atrocities Act. It was also suggested to the injured complainant that in all these cases, the cases were compounded after taking some amount. Of course the suggestion was denied by the complainant. The learned advocate for the appellants invited attention to the contents of paragraph Nos.7, 8 and 9 of the deposition of the complainant. He submitted that appreciating the deposition of the complainant as a whole, it is not inspiring confidence, more particularly looking to the contradictions which are material in nature and strike at the root of the deposition.

15. The learned advocate for the appellants submitted that similar is the case with the depositions of Lilaben – wife of the complainant and Shilpaben – daughter of the complainant. He submitted that like the complainant, these two witnesses also tried to improve upon the story while before the Court and this particular aspect was brought successfully before the Court while referring to the cross-examination of Lilaben – PW15, Exh.42 and Shilpaben – PW16, Exh.43, reading with the deposition of the Investigating Officer – PW19, Exh.47.

16. The learned advocate for the appellants next invited attention to the aspect that the prosecution has failed

to prove by leading necessary evidence in the form of documentation about the belonging of the complainant to a particular caste and that caste being recognized as Scheduled Caste or Scheduled Tribe in the area. He submitted that it is mandatory for the prosecution to establish before the Court that the complainant belongs to a particular caste and that, that caste is included in the list of Scheduled Caste or Scheduled Tribe before any offence could be proved against the accused. He submitted that this being not done, the case of the prosecution, so far as offence under the Atrocities Act is concerned, must fail.

17. Learned Additional Public Prosecutor vehemently submitted that no such document is required to be produced before the Court.

In the considered opinion of this Court, the fact that at one place the complainant refers himself as, 'Harijan', at other place he refers himself as, 'Vankar' and at third place, he refers himself as, 'Koli' community, makes it necessary that the prosecution should have brought home this aspect as to the complainant belonging to a particular community and that community is included in the list of Scheduled Caste/Scheduled Tribe. That being so, conviction under the Atrocities Act must fail.

It will not be out of place to refer to the discrepancy which is crept in the judgment, where in the operative part, the learned Sessions Judge has recorded in paragraph No.27 that, an offence under Section 3(1)(2)(10) of the Atrocities Act is committed, whereas while it comes to paragraph No.28, the learned Sessions Judge refers to only Sub-clause (1)(10) of Section 3(1) of the Atrocities Act and when it comes to awarding of sentence, the learned Sessions Judge has awarded sentence for an offence under Sub-clause (1)(10) of Section 3(1) of the Atrocities Act. Even this discrepancy cannot be said to be an inadvertent one.

Having perused the complaint which at Mark A, while narrating the incident of 13.04.1991, there is not a whisper of any act which will constitute an offence under the Atrocities Act and therefore, conviction of the accused under the Atrocities Act is quashed and set aside.

18. The learned advocate for the appellants next submitted that when the evidence of the injured complainant, his wife and daughter are not found trustworthy on one aspect, the same cannot be found trustworthy on the other aspects also.

Submission of the learned advocate for the

appellants does not found favour with the Court for the simple reason that it is a matter of which judicial note can be taken that whenever an incident takes place, person affected in the incident, do have a tendency to exaggerate the incident and therefore, even if the evidence is not found trustworthy on a particular aspect, that by itself is not the reason to disbelieve the evidence as a whole and therefore, so far as factum of the incident having taken place and the factum of the injured complainant having sustained injuries, cannot be disbelieved. It may be that the injured complainant himself and his wife and the daughter will have an interest to exaggerate the incident and may have an intention to implicate as many as persons as possible, but the same cannot be discarded in totality

19. Taking into consideration the evidence as a whole and taking into consideration the documentary evidence, whereby the injured complainant has sustained two fractures, one on the hand and other on the leg, the conviction of accused No.4 for an offence under Section 325 of the Indian Penal Code, i.e. higher than the offence under Sections 323 and 324 of the Indian Penal Code, is uphold.

So far as other accused are concerned, viz. 1, 2 and 3, the Hon'ble Court is of the opinion that the case

against them is not proved beyond reasonable doubt and therefore, they are acquitted of the offences alleged against them.

As appellant Nos.1, 2 and 3 are acquitted of the charges, fine paid by them is ordered to be refunded.

20. Taking into consideration contents of Section 360 of the Criminal Procedure Code, Section 4 of the Probation of Offenders Act, circumstances of the case, nature of the offence, the character of the offender, time lag and the fact that there is no untoward incident has taken place during this entire period, accused No.4 is released on probation of good conduct, who was not granted benefit of Probation of Offenders Act, 1958 only in view Section 19 of the Atrocities Act.

Accused No.4 is directed to be released on probation of good conduct on his entering into a bond in the sum of Rs.5,000/- (Rupees Five Thousand Only) for a period of one year, to appear and receive sentence when called upon during the period of one year.

Appeal is allowed to the aforesaid extent.

(RAVI R.TRIPATHI, J.)

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